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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 714

DAVID W. ERICKSON, Doing Business as ERICKSON HAIR AND SCALP SPECIALISTS,

Petitioner

vs.

FEDERAL TRADE COMMISSION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DAVID W. ERICKSON, DOING BUSINESS AS ERICKSON HAIR AND SCALP SPECIALISTS,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, David W. Erickson, doing business as Erickson Hair and Scalp Specialists, prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Seventh Circuit, filed November 19, 1959, which ordered the enforcement of the cease and desist order of the Federal Trade Commission against the petitioner.

JURISDICTION.

Jurisdiction to review this case upon is invoked under 28 U. S. C. § 1254(1). The order of the Court of Appeals for the Seventh Circuit was entered November 19, 1959.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit was filed on November 19, 1959 and judgment was entered on that date in accordance with the opinion. The opinion is reported in 272 F. 2d 318 (Appendix, *infra*, pp. 20-26).

QUESTIONS PRESENTED.

1. Whether the findings of the Commission are sustained by substantial evidence.

2. Whether the order of the Commission is invalid in that (a) it is at variance with the complaint upon which it is based, (b) it is not supported by the findings of the Hearing Examiner and (c) it is broader than the law upon which it is based.

3. Whether the conduct of the Hearing Examiner was indicative of bias and prejudice against the petitioner and was in violation of the letter and spirit of the Administrative Procedure Act, Title 10, U. S. C. §§ 1001-1007.

STATUTES INVOLVED.

Federal Administrative Procedure Act, Title 10, U. S. C. §§ 1001-1007; Federal Trade Commission Act, Title 15, U. S. C. § 12(a)(4).

STATEMENT.

NATURE OF THE CASE.

The facts relevant to this case are:

The proceeding in the Court of Appeals for the Seventh Circuit was a petition for review pursuant to Section 5 of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. A. § 45) of an Order issued by the Federal Trade Commission that petitioner (respondent below) David W. Erickson, trading as Erickson Hair and Scalp Specialists or under any other name or names, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the various cosmetic or other preparations described in the findings of the Commission, or of any other preparations for use in the treatment of hair and scalp conditions, do cease and desist from:

1. Disseminating any advertisement which represents directly or by implication:

   (a) That the use of said preparations alone or in conjunction with any method of treatment will:

   (1) Permanently eliminate dandruff, itching or irritation of the scalp,

   (2) Cause fuzz to be replaced with long or strong hair,

   (3) Prevent or overcome excessive hair loss or baldness or cause new hair to grow, or cause hair to grow thicker or otherwise grow hair, unless such representations be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicu-

ously reveals that in the great majority of cases of baldness and excessive hair loss, respondent's said preparations and treatments are of no value whatever.

(b) That respondent, his agents, representatives or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

2. Disseminating any advertisement for the purpose of inducing the purchase of said preparations in commerce.

Before the Hearing Examiner and the Federal Trade Commission, the following questions were raised:

(a) There was no substantial evidence to support the essential findings of the Federal Trade Commission.

(b) The order of the Federal Trade Commission was invalid in that it goes beyond the findings of the Hearing Examiner.

(c) There was a failure of due process of law due to the bias and prejudice shown by the Hearing Examiner.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Seventh Circuit erred.

1. In holding that there was credible, reliable and substantial evidence to sustain the Commission's order.

2. In holding that the Commission's order was valid and does not exceed its statutory authority.

3. In holding that there was no prejudicial error in the challenged rulings of the Hearing Examiner.

REASONS RELIED ON FOR GRANTING THE WRIT.

Petitioner believes that there are important reasons why there should be a review of the decision of the Court of Appeals for the Seventh Circuit in this case. It might appear that petitioner is attempting to argue against a great weight of cases upholding orders of the Federal Trade Commission. As difficult as such task may be, petitioner is proceeding on the theory that factual questions passed on by the Commission must be decided as provided by law, and that this statement has been held to be the law applicable to such cases.

I.

In proceedings of this nature the burden of proof is on the Commission. The Federal Trade Commission in its Rules of Practice and Procedure provides as follows:

> "§ 3.14 evidence—(a) Burden of Proof. Counsel supporting the complaint shall have the burden of proof, but the Proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."

The courts also recognize this rule. *Prima Products, Inc.*, v. *Federal Trade Commission*, 209 F. 2d 405, 409 (2d Cir. 1954).

Section 5 (c) of the Federal Trade Commission Act (15 U. S. C. A. § 45(c)) which deals with appeals from Commission's orders states, "The findings of the Commission as to the facts *if supported by evidence* shall be conclusive * * *." (Emphasis supplied.)

This is the rule on review of all administrative rulings including those of the Federal Trade Commission. In *Carlay Co. v. Federal Trade Commission*, 153 F. 2d 493, 496 (7th Cir., 1946), the Court stated:

> "Substantial evidence is more than a mere scin-

tilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter.* It implies a quality and character of proof which induces conviction and makes a lasting impression on reason. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126; *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299, 59 S. Ct. 501, 83 L. ed. 660; *National Labor Relations Board v. Thompson Products, Inc.*, 6 Cir., 97 F. 2d 13, 15. The rule of substantial evidence is one of fundamental importance and marks the dividing line between law and arbitrary power; and the requirement that a finding must be supported by substantial evidence does not go so far as to justify orders without a basis in evidence having rational, probative force."

See also:

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 477.

II.

THERE IS NO CREDIBLE, RELIABLE OR SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S ORDER.

In the order, the Commission exceeds the scope of this issue as raised in the complaint. The specific point was raised during the proceedings and nowhere does it appear that Respondent had held himself out to be a Doctor, dermatologist or any other kind or type of medically trained person. By use of the word "Trichologist", Respondent has indicated that he is not a "Doctor" or a Doctor specializing in "dermatology" or an otherwise medically trained person. He merely indicates that he is familiar with what

is known regarding the hair, its anatomy, chemistry and physiology.

The Statutes of the State of Illinois provide that treatment of the face, hair and scalp with oils, creams or other preparations generally are all within the scope of operation of barbers and beauty culturists (Illinois Revised Statutes, 1959, Ch. 16½, Sections 14.39 and 16).

The result of the decision of the Court of Appeals, is to usurp the regulatory powers of the individual states, and to endow the Federal Trade Commission, with authority to regulate and control the practice of medicine, barbering and beauty culture, heretofore reserved to the states. Petitioner denies the right and the power of the Commission to do this, basing this particular objection on the Tenth Amendment to the Federal Constitution.

Paragraph six of the complaint alleged, in substance, that Petitioner had stated and represented that as a result of his services, methods, treatments and preparations, "dandruff, itching and irritation of the scalp will be permanently eliminated." Such allegations remain unproven. Nowhere in the record is there anything to indicate that Respondent used such terms in his advertising. "Permanently eliminate" is not the same as "clear up" or "correct". As the Hearing Examiner stated, twenty-nine members of the public, all satisfied users of Petitioner's services, testified at the hearings. Those who had suffered from the conditions of dandruff, itching and irritation of the scalp, and this comprised the great majority of those testifying, stated that dandruff, itching and irritations of the scalp ceased after having enrolled in Petitioner's course of treatment, and that they had followed exclusively, the methods recommended by Petitioner, and used Respondent's ideas, consultation services and preparations.

Apparently these users (A. 94) understood what they read for all that Petitioner had indicated to them was that

by taking his treatments, availing themselves of his consultation services, and making use of his accompanying preparations, exclusively, and in accordance with his directions, dandruff, itching and irritation of the scalp could be removed.

These limited claims of Respondent, having been established in fact through practical application and excellent results, were established in that there was unanimous agreement of all medical experts called by both the Commission and the Respondent, who were questioned on this subject. As the Hearing Examiner points out in Paragraph 23 of the Initial Decision (A. 133) these experts testified that the ingredients in Respondent's preparations, if properly used, will eliminate dandruff, itching and irritation of the scalp. Neither Respondent nor the experts asserted, nor does Respondent's advertising say, that such conditions will not return, if the use of the services and preparations is stopped.

Respondent has not claimed a "permanence" for his treatments and services. Such treatments and services are not to be used on a short-term basis. Several months of treatment involving both the benefits of consultation with Respondent or his associates and the use of the treatments themselves, at home by the user were needed. The permanent care of the hair and scalp, through a balanced program of scalp hygiene, required the use of home treatments, to maintain a healthy scalp, free from dandruff, itching and irritation.

The Hearing Examiner stated in Footnote 1 (A. 130):

> "If one can free one's mind from worries about dandruff, itching and irritation of the scalp by use of Respondent's preparations, methods and treatment, that means to this Hearing Examiner that these things will be permanently eliminated."

With reference to paragraph 35 of the findings, which states that Petitioner has represented that his preparations will permanently eliminate dandruff, the advertising quoted does not make that representation.

In *Folds* v. *F. T. C.*, 187 F. 2d 658, 661 (7th Cir.), the court stated:

> "The real basis for the Commission's complaint was that petitioners represented that Kleerex was an effective treatment for pimples. No such representation was ever made, but the Commission purported to find in the advertisements an implied representation to that effect * * *. We do not think that the Commission's finding that Petitioners made such a representation is supported by substantial evidence."

In *International Parts Corp.* v. *F. T. C.*, 133 F. 2d 883, 886 (7th Cir.), the court held that:

> "The Commission cannot interpolate in to the Petitioner's representations words not there, and then find Petitioner guilty of misrepresentation because the Petitioner's product does not meet the Commission's revised representations. The word 'prevents' is a word of common understanding, and the common acception of this word carrier no connotation of permanency. The Petitioner will be presumed to have used the word in its ordinary and commonly accepted understanding, in the absence of any showing to the contrary. * * * Without the word 'permanently' interpolated, there is no misrepresentation. The word permanently is the Commission's word, not the Petitioner's. The Petitioner answers for its own representation, and not those of the Commission."

III.

THE HEARING EXAMINER IMPROPERLY RESTRICTED PETITIONER'S EFFORTS TO PRESENT EVIDENCE AND HIS RIGHT OF CROSS-EXAMINATION.

In *U. S. v. Morton Salt Co.*, 338 U. S. 632, this Court said (at p. 644):

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment upon civil rights."

Section 7 (c) of the Federal Administrative Procedure Act, 10 U. S. C. § 1006 (c) provides that every party shall have the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts." As pointed out by the Court in *N. L. R. B. v. Bell Oil & Gas Co.*, 98 F. 2d 870, 871 (5th Cir.), "It is elementary that there is a distinction between the admissibility of evidence and its weight or sufficiency."

The Hearing Examiner actively intervened to the detriment of Petitioner. The Examiner's function is not to be an active participant in the hearings, but to function in a judicial manner. Counsel should be able to conduct the proceedings efficiently, asking questions as he sees fit, examining and cross-examining witnesses according to his plan, submitting evidence as he chooses, and raising his objections, without coaching or other assistance, such as cues as to when to object, from the Examiner.

The pattern was set on the first day of the hearings, when Petitioner's counsel was examining Petitioner, and the Hearing Examiner intervened in the questioning.

The record indicates the Examiner saying "Wait a minute" before Counsel indicated any objection to the line of questioning embarked upon by Petitioner's counsel (A. 24).

Again (A. 26), the Hearing Examiner actively intervened by stating "Wait a minute" and "I think that question is objectionable * * *" Nowhere in the colloquy between the Petitioner's counsel and the Examiner is there any indication that there is an opposing counsel, other than in the person of the Hearing Examiner.

Numerous similar situations arose in the record (A. 27, 30, 31, 32).

Again, in the record an objection is "sustained" when one has not actually been made, except as a result of active participation by the Examiner (A. 28).

Similarly (A. 29), "Wait a minute, I am going to object to that question myself."

"I think he has been over that sufficiently. I understand what he said about it" (A. 55).

Examination was further restricted when Petitioner's counsel sought to obtain from user witnesses the impressions they gained from reading Petitioner's advertisements. And as indicated in the record, the Examiner again intervened, limiting the cross-examination when Petitioner's counsel sought to examine the Commission's rebuttal witness with regard to the writings of an authority whose position was contrary to that of the Commission's expert (A. 105-106).

Not only was this done, so that counsel was thwarted in his efforts to pursue his cross-examination, but the Examiner testified with regard to his claimed special and personal knowledge of a different position allegedly taken by the authority whose work was sought to be examined (A. 38-41, 105-106).

As stated in *Donnelly Garment Co.* v. *N. L. R. B.*, 123 F. 2d 215, 222 (8th Cir.), "Evidence is relevant, if it tends either to prove or to disprove any issue in a case." And when referring to the holding of the Supreme Court in *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, the same court said at page 223:

> "It is obvious that there was no difference of opinion as to the existence of the constitutional requirement that an administrative agency must receive and consider evidence which is competent and material. The problem considered in that case was whether the evidence rejected by the Board was competent and material. This Court thought that the evidence was not material, and a majority of the Supreme Court were of the same opinion."

In *Cupples Co. Manufacturers* v. *N. L. R. B.*, 106 F. 2d 100, 113 (8th Cir.), the Court said:

> "If a trial examiner will only keep in mind that the proper exercise of his functions requires open-mindedness, fairness and impartiality and if he will within reasonable limits, permit each of the parties to the proceeding before him to prove his own case, in his own way, by his own counsel, he will save himself from criticism and avoid any basis for a charge that the hearing was unfair and that bias was shown."

In *Donnelly Garment Co.* v. *N. L. R. B.*, 123 F. 2d 215, 224 (8th Cir.), the Court points out that:

> "If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or hearing cannot be avoided."

The Court further stated, as follows:

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and

consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. See *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73 (1936), *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 304-305 (1937), *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U. S. 388, 393 (1938), *Morgan v. United States*, 304 U. S. 1, 14, 15 (1938)."

Petitioner earnestly submits to this Honorable Court facts, which the record, and those instances set out by petitioners abstract thereof, indicate that in the hearing, Petitioner "was denied that fairness which is required by due process of law." *Montgomery Ward & Co. v. N. L. R. B.*, 103 F. 2d 147, 149 (8th Cir.).

The Examiner's attitude of bias resulted in an unfair restriction of cross-examination by counsel for Petitioner and an equally unfair restriction on efforts by counsel for Petitioner to submit evidence both competent and material.

As was said in *Montgomery Ward & Co. v. N. L. R. B.*, 103 F. 2d 147, 156 (8th Cir.), "* * * naturally it requires reading of this entire evidence to get the full perception of the clearly biased attitude of the examiner. Instead of maintaining the impartial position of one who is to determine—in a preliminary stage—ultimate facts and action thereon, he assumed the place of attorney supporting the complaint."

As stated in *Goldstein v. United States*, 63 F. 2d 609, 613 (8th Cir.), where the court quoted from *Sunderland v. United States*, 19 F. 2d 202, 216 (8th Cir.), "The term 'fair trial' is often used, but not defined. It is of broad scope. While we shall not undertake to give a formal definition of the term, yet it may not be amiss to mention, in part at least, its content. * * * It means a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. * * * Being impartial means being indif-

ferent as between the parties. * * * It means that, while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror."

When an effort was made by Petitioner's counsel to examine experts called by the Commission with regard to text books in the field of this specialty, that effort was thwarted. This in spite of the fact that these experts were relying upon their "general professional knowledge" and the authors or editors of these texts have and had positions of eminence within the specialty. Thus, the Commission witnesses remained unexamined with regard to their knowledge or lack thereof (A. 38, 40, 41, 52, 53).

The limitation took place in spite of the admonition of the Supreme Court's admonition in *Reilly* v. *Pinkus*, 338 U. S. 269, 275 where the court said:

> "* * * it has been pointed out that the doctors' expert evidence rested on their general professional knowledge. To some extent this knowledge was acquired from medical text books and publications on which these experts placed reliance. In cross-examination respondent sought to question these witnesses concerning statements in other medical books, some of which at least were shown to be respectable authorities. The questions were not permitted. We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books. * * * It is also contended that the error in restricting cross-examination was harmless here because the memorandum of the fact-finding official indicated that he had read the excluded materials and would have made the same adverse findings had the materials

been held admissible. But the object of using the books on cross-examination was to test the expert's testimony by having him refer to and comment upon their contents. Respondent was deprived of this opportunity. The error of this deprivation could not be cured by having the fact-finder subsequently examine the material."

As an additional indication of undue and improper restriction placed upon Counsel for Petitioner, the Court's attention is called to the efforts of said Counsel to qualify Petitioner as an expert witness, and the improper thwarting of these efforts (A. 55-58). The special training, skill, practical and theoretical experience and knowledge of Petitioner are evident from the record. His background qualifies him as an expert in the field of hair and scalp treatment. He is skilled and experienced in the business to which the subject matter of this case relates:

"A witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research." Am. Jur., Vol. 20, § 784.

Petitioner had not only practical experience but had made a study of theory as well (A. 19, 23, 24, 57). Petitioner's qualifications closely resemble the situation confronting the court in *Bratt* v. *Western Air Lines*, 155 F. 2d 850 (10th Cir.), where the court held that the lack of professional standing in the science of aerodynamics did not disqualify the witness from testifying as an expert. In that case it was shown that the witness had both practical experience in the field and had made a study of the theoretical principles in the field over a period of more than two years.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, November 19, 1959.

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

DAVID W. ERICKSON, d/b/a Erickson Hair and Scalp Specialists, *Petitioner,*

No. 12635 *vs.*

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Review of an order of the Federal Trade Commission.

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission, and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition to review and set aside the cease and desist order of the Commission, entered therein on February 26, 1959, be Denied, and enforcement of the said order of the Federal Trade Commission is ordered, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

DAVID W. ERICKSON, d. b. a. ERICKSON HAIR & SCALP SPECIALISTS,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.
No. 12635

FINAL DECREE.

David W. Erickson, doing business as Erickson Hair & Scalp Specialists, petitioner herein, having filed in this Court on May 4, 1959, its petition to set aside an order to cease and desist issued against it on February 26, 1959, by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled In the Matter of David W. Erickson, doing business as Erickson Hair & Scalp Specialists, Docket No. 6497; and the petition having been heard by this Court on briefs and oral argument; and this Court having thereafter fully considered the matter and rendered its decision on November 19, 1959, denying the petition to set aside the cease and desist order and granting respondent's prayer for affirmance and enforcement;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the aforesaid petition to review be, and the same hereby is, denied, and that the said order to cease and desist be, and it hereby is, affirmed and enforced, and petitioner is hereby commanded to obey said order to cease and desist and to comply therewith.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the aforesaid petition to review be, and the same hereby is, denied, and that the said order to cease and desist be, and it hereby is, affirmed and enforced, and petitioner is hereby commanded to obey said order to cease and desist and to comply therewith.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that within ninety (90) days after entry of this decree petitioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which he has complied with said order to cease and desist.

Without prejudice to the right of the United States as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist hereby affirmed and enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary to effectively enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

/s/ JOHN S. HASTINGS,
/s/ ELMER J. SCHNACKENBERG,
/s/ WIN G. KNOCH,
United States Circuit Judges.

Entered: January 6, 1960.

A true Copy:
Teste:

KENNETH J. CARRICK,
(SEAL) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

IN THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit.

September Term and Session, 1959.

No. 12635 DAVID W. ERICKSON, doing business as ERICKSON HAIR AND SCALP SPECIALISTS, *Petitioner,* *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	Petition for Review of Order of the Federal Trade Commission.

November 19, 1959.

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and KNOCH, *Circuit Judges*.

HASTINGS, *Chief Judge*. This is a petition to review and set aside an order of the Federal Trade Commission requiring petitioner, David W. Erickson, doing business as Erickson Hair & Scalp Specialists, to cease and desist from falsely advertising petitioner's medicinal and cosmetic preparations in violation of the Federal Trade Commission Act, 15 U. S. C. A. § 45, *et seq.*

The Commission's complaint charged petitioner (respondent below) with disseminating, through the United States mails and by various means in interstate commerce, false advertisements concerning his preparations, all to the prejudice and injury of the public; it further charged that such conduct constituted unfair and decep-

tive acts and practices within the intent and meaning of the Federal Trade Commission Act. Petitioner answered the complaint, admitted the composition of his preparations and the fact that he advertises, denied generally the other allegations, and included an averment that the acts and practices complained of were not in violation of the Federal Trade Commission Act.

Hearings were held and evidence was presented by both parties. The Hearing Examiner issued an initial decision and a proposed order to cease and desist, and petitioner appealed to the Commission. Upon consideration of briefs and oral argument, the Commission denied the appeal and adopted the Hearing Examiner's findings and proposed order. That part of the order we are asked to review directs petitioner forthwith to cease and desist from,

> "1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:
>
> "(a) That the use of said preparations alone or in conjunction with any method of treatment will:
>
> (1) Permanently eliminate dandruff, itching or irritation of the scalp,
>
> (2) Cause fuzz to be replaced with long or strong hair,
>
> (3) Prevent or overcome excessive hair loss or baldness or cause new hair to grow, or cause hair to grow thicker or otherwise grow hair; unless such representations be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that in the great majority of cases of baldness and excessive hair loss, respondent's said preparations and treatments are of no value whatever.

"(b) That respondent, his agents, representatives or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

"2. Disseminating or causing to be disseminated by any means, any advertisement for the purpose of inducing or which is likely to induce directly or indirectly the purchase of said preparations in commerce, as 'commerce' is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in Paragraph 1 hereof."

From the record before us we find that the following relevant facts were well established. Petitioner's principal place of business is in Chicago, Illinois, from which he distributes through interstate commerce home treatment kits of various medicinal and cosmetic preparations designed for external use in the prevention of baldness, the growing of hair and the elimination of various scalp disorders. The total value of his business from his Chicago office is from $60,000 to $80,000 annually.

In conducting his business petitioner or his representative visits various cities throughout the United States where he conducts a so-called hair and scalp "clinic," usually in the room of a local hotel. Prior to visiting a particular city, petitioner places an advertisement in a local newspaper of that city inviting prospective customers to call on him for free consultation and advice about their hair and scalp problems. A substantial number of such newspapers are distributed in interstate commerce. Petitioner accepts for treatment 95% of the persons who respond to his advertisements and, when agreeable to the prospect, sells him a home treatment kit containing his various preparations which is mailed directly to the purchaser from petitioner's Chicago office.

In some of these newspaper advertisements petitioner refers to himself as a "trichologist." A typical advertisement purports to be a newspaperman's report of an interview with petitioner and contains a picture of petitioner attired in a type of white jacket customarily worn and associated with members of the medical profession. The picture shows petitioner pointing to what appears to be a clinical chart depicting the human scalp with relation to hair and hair follicles. In this advertisement petitioner states that he has directed some of the largest "clinics" in the United States and Canada. Two of the Commission's expert medical witnesses testified that, to bear the title "trichologist" properly, a person should be a dermatologist. Petitioner has had no medical training, and his college education was limited to one semester in "marketing."

Without attempting to quote further from the several exhibits before us, we think it is fair to say that in his advertisements petitioner represents that he can, without qualification, through the use of his preparations and method of treatment prevent or overcome baldness, cause hair to grow thicker, cause new hair to grow, cause fuzz to develop into longer and stronger hair, and permanently eliminate dandruff, itching and irritation of the scalp. The uncontradicted medical evidence of record shows that neither petitioner's preparations nor any others will accomplish these results.

The Commission's qualified medical witnesses testified that most cases of baldness are accounted for by a condition known as *male pattern baldness*. It is said to be most common in the male adult, and *its precise cause has not been medically proven*. Various conflicting theories have been advanced as to its cause but there is no medical evidence that male pattern baldness will respond to the external application of various chemical and cosmetic pre-

parations as far as the progression of loss of hair is concerned. Admitting that certain of petitioner's consumer witnesses testified as to the efficacy of his preparations, it was not shown that any of them had suffered loss of hair due to male pattern baldness.

Petitioner's chief contention is that there is no credible, reliable or substantial evidence to sustain the Commission's findings on which the cease and desist order is based or to support such an order against petitioner. We disagree.

It is for the Commission to appraise the credibility of witnesses, to weigh evidence and to draw inferences therefrom. On review, our task is to determine whether the findings are supported by substantial evidence. *Keller* v. *Federal Trade Commission*, 7 Cir., 132 F. 2d 59, 60 (1942). If the findings are thus supported, *Aronberg* v. *Federal Trade Commission*, 7 Cir., 132 F. 2d 165, 170 (1942), they are conclusive and binding on us. Opinion evidence based on general medical and pharmacological knowledge constitutes substantial evidence. *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 7 Cir., 111 F. 2d 889, 891 (1940). Whether there is a consensus of medical opinion is a question of fact; a conflict of medical opinion concerning the effectiveness of a preparation also presents a question of fact, *United States* v. *Kaadt*, 7 Cir., 171 F. 2d 600, 603 (1948), and is therefore to be resolved by the Commission.

Likewise, as Chief Judge Duffy said in *Kalwajtys* v. *Federal Trade Commission*, 7 Cir., 237 F. 2d 654, at page 656 (1956):

> "The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission and should be upheld by a reviewing Court unless arbitrarily or clearly wrong. *Rhodes Pharmacal Co., Inc.* v. *Federal Trade*

Commission, 7 Cir., 208 F. 2d 382, 387; *Parker Pen Co.* v. *Federal Trade Commission*, 7 Cir., 159 F. 2d 509, 511."

Further, it is sound to say that the fact that petitioner had satisfied customers is not a defense to Commission action for deceptive practices. *Independent Directory Corp.* v. *Federal Trade Commission*, 2 Cir., 188 F. 2d 468, 471 (1951).

Tested by these well-established standards and on the record before us, we hold that the findings and order of Commission are supported by substantial evidence. We agree with the conclusions of the Commission that petitioner was engaged in unfair and deceptive practices in commerce.

Petitioner also contends that the Commission's order is broader than the findings will support and is in excess of its statutory authority. This is predicated on the proscription in the order of advertisements "of any other preparations for use in the treatment of hair and scalp conditions." However, we think that a reading of the preamble of the order and the whole of paragraph 1 will show that the only prohibition as to "any other preparations" relates to the false representations contained in petitioner's advertising found to be deceptive. "Unless the Commission's order is broad enough to cover all preparations petitioner need only to change the formula of his present preparations and continue to engage in the same false and deceptive practices condemned by the Commission," as Government counsel aptly points out. If petitioner does discover some method of curing male pattern baldness in the future, under Commission rules, he may seek modification of the order.

It is settled beyond dispute that in formulating its order to cease and desist, the Commission is empowered to determine the appropriate remedy according to the nature and

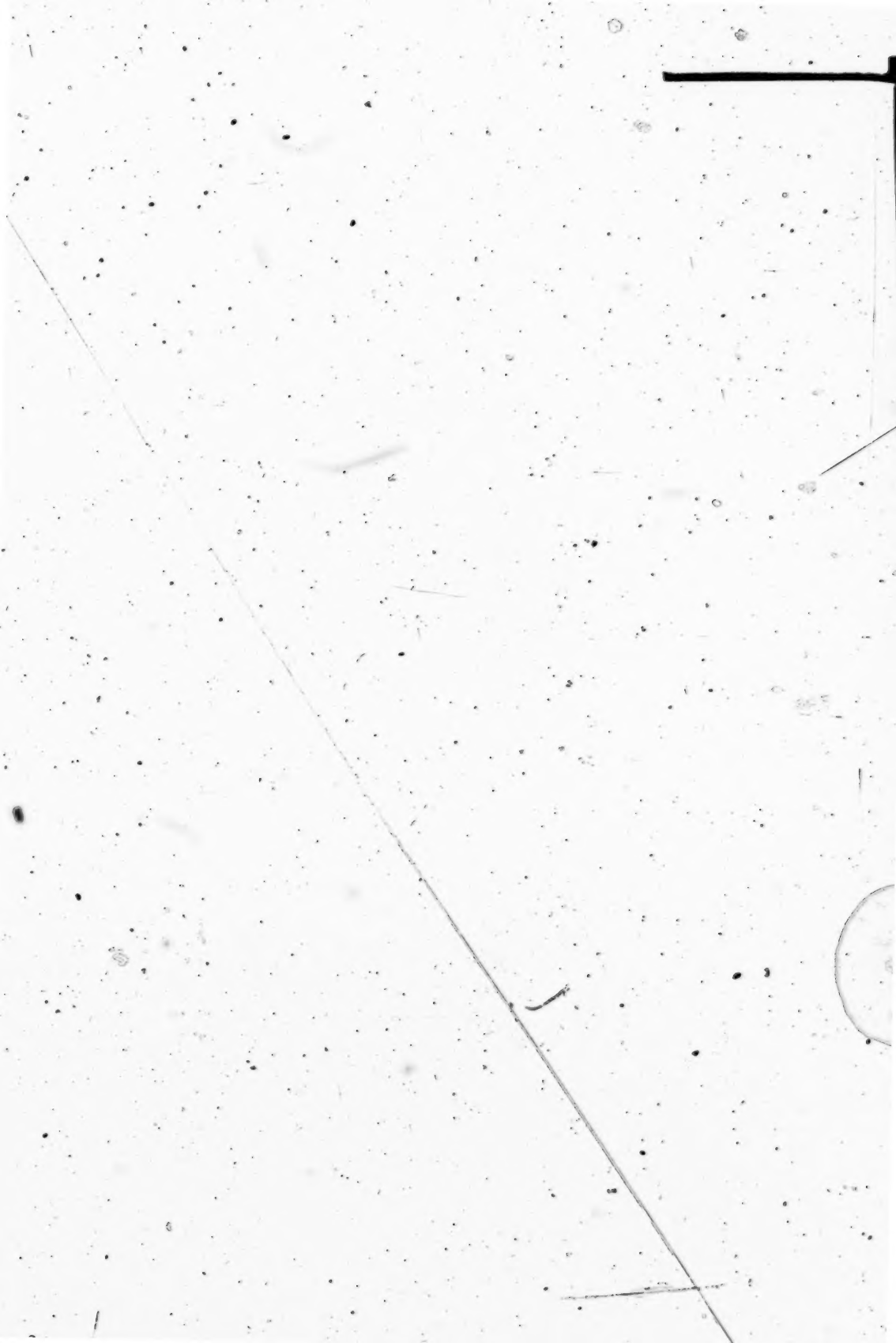
character of the unfair practice. *Keller* v. *Federal Trade Commission*, 7 Cir., 132 F. 2d 59, 61 (1942). Orders of the Federal Trade Commission are intended to prevent illegal practices in the future. "In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952). The Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed, *Seigel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611 (1946), and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 613, and followed in *Ruberoid*, 343 U. S. at page 473. See also *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 428 (1957).

We hold that the Commission's order is valid and does not exceed its statutory authority.

Petitioner finally charges that "the Hearing Examiner was prejudiced, showed bias and improperly restricted petitioner's efforts to present evidence and his right of cross-examination." We have carefully considered this contention and find that it is without merit. We find no prejudicial error in the challenged rulings of the Hearing Examiner. See, *Dolcin Corp.* v. *Federal Trade Commission*, D. C. Cir., 219 F. 2d 742 (1954).

The petition to review and set aside the cease and desist order of the Commission will be denied, and enforcement of the order of the Commission is now ordered.

ENFORCEMENT ORDERED.



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FILED
MAR 18 1960
JAMES R. BROWNING, Clerk

No. 714

In the Supreme Court of the United States

OCTOBER TERM, 1959

DAVID W. ERICKSON, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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CITATIONS

Cases:

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Federal Trade Commission v. *Sewell*, 353 U.S. 969, reversing 240 F. 2d 228 — 4–5

Independent Directory Corp. v. *Federal Trade Commission*, 188 F. 2d 468 — 5

Kalwajtys v. *Federal Trade Commission*, 237 F. 2d 654, certiorari denied, 352 U.S. 1025 — 5

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543554—60

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 20–26) is reported at 272 F. 2d 318. The opinion and order of the Federal Trade Commission (Pet. App. 123–142) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1959 (Pet. 17), and the final decree of that court was entered on January 6, 1960 (Pet. 18–19). The petition for a writ of certiorari was filed on February 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the Federal Trade Commission are supported by substantial evidence.

2. Whether the Hearing Examiner improperly restricted petitioner's presentation of evidence or his right to cross-examination.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 717, as amended by 52 Stat. 114, 15 U.S.C. 52) are as follows:

> SEC. 12(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

* * * * *

STATEMENT

After full administrative proceedings, the Federal Trade Commission held that petitioner had violated Section 12 of the Federal Trade Commission Act by disseminating false advertisements of cosmetic and medicinal preparations used in hair and scalp treatment, and issued a cease-and-desist order (Pet. App.

123–142).[1] The court of appeals unanimously affirmed (Pet. 20–26). It held that the Commission's findings were supported by substantial evidence, that its order was not too broad, and that no prejudicial error was committed by the examiner in the conduct of the hearings (*ibid.*).

From his principal place of business in Chicago, Illinois, petitioner distributes to purchasers outside of Illinois, home treatment kits of various cosmetic and medicinal preparations designed for external use in the prevention of baldness, the growing of hair, and the elimination of certain scalp disorders (Pet. App. 124). In the course of his business, petitioner or his representatives visit various cities throughout the United States for the purpose of conducting so-called hair and scalp "clinics" (Pet. App. 126). Prior to each visit, petitioner places advertisements in a local newspaper inviting prospective customers to call on him for free consultation and advice about their hair and scalp problems (*ibid.*). A substantial number of such newspapers are distributed in interstate commerce and by the United States mails (Pet. App. 128). Of those responding to his advertisements, petitioner accepts about 95% for treatment, and sells them one of his home treatment kits which is mailed from the Chicago office (Pet. Opp. 127).

The Commission, adopting the examiner's initial decision (Pet. App. 142), found that by describing himself in his promotional material as a "trichologist,"

[1] "Pet. App." refers to the printed appendix to petitioner's brief and "Resp. App." to the printed appendix to respondent's brief in the court below.

petitioner falsely represented he has had competent medical training in the treatment of scalp disorders affecting the hair (Pet. App. 137–138); that petitioner's advertisements falsely represented that the use of his preparations would permanently eliminate dandruff and irritations of the scalp (Pet. App. 138); and that petitioner's representations that he could prevent or overcome baldness were false when not limited to cases other than "male pattern baldness" (*ibid.*), which condition accounts for the vast majority of all cases of baldness (Resp. App. 16).

ARGUMENT

Petitioner raises two issues: (1) that the Commission's findings are not supported by substantial evidence, and (2) that the hearing examiner improperly restricted petitioner's presentation of evidence and his right of cross-examination (Pet. 6–15). Both of these contentions were correctly rejected by the court of appeals, and neither presents an issue warranting further review.

1. The claim of lack of substantial evidentiary support for the findings is based on the fact that petitioner produced a number of customers who testified that they had not been deceived by petitioner's advertisements, and that they were satisfied with the results of his treatments. There was, however, expert medical testimony that petitioner's therapeutic claims and his use of the term "trichologist" were false. The weighing of the evidence is, of course, for the Commission, and the latter is not required to reject otherwise credible expert medical opinion merely because of the testimony of satisfied lay users. *Federal Trade*

Commission v. *Sewell*, 353 U.S. 969, reversing 240 F. 2d 228 (C.A. 9); see *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468, 471 (C.A. 2); *Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654, 656 (C.A. 7), certiorari denied, 352 U.S. 1025.

2. Petitioner's attack on the examiner's conduct of the hearing is equally without merit. It involves such things as the examiner's refusal to permit petitioner's counsel to continue a line of questioning that the examiner deemed improper, without awaiting objection to the particular question by Commission counsel; the examiner's comment that the author of a treatise petitioner intended to use on cross-examination, had, to the examiner's knowledge, subsequently changed his position (Pet. App. 38–39); and the refusal to allow petitioner to testify as an "expert" in the absence of an adequate showing of his qualifications. These contentions were all "carefully considered" by the court below and found to be "without merit" (Pet. 26).

Contrary to petitioner's argument (Pet. 14), the examiner did not depart from the rule laid down in *Reilly* v. *Pinkus*, 338 U.S. 269, in refusing (Pet. App. 52–53) to permit the use of a treatise in cross-examination of a Commission expert witness. For here the witness had not substantially based his direct testimony upon "knowledge [which] was acquired from medical text books and publications" (*Reilly* v. *Pinkus*, *supra*, at 275). See *Dolcin Corp.* v. *Federal Trade Commission*, 219 F. 2d 742, 746–47 (C.A.D.C.) certiorari denied, 348 U.S. 981. And in any event the court below, as had the court in *Dolcin*, *supra*, found "no

prejudicial error in the challenged rulings of the Hearing Examiner" (Pet. 26). This ruling was clearly correct in view of the fact that the treatise sought to be used in examining the Commission expert dealt with the basic cause of baldness—a matter not significantly in issue in the instant case.

CONCLUSION

The decision below is correct and no questions calling for further review are presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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